

N. 9851

No. 14084

United States
Court of Appeals
for the Ninth Circuit.

OREGON-WASHINGTON PLYWOOD COM-
PANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

**Petition to Review a Decision of
The Tax Court of the United States.**

FILED

DEC 4 1953

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

For Petitioner:

GEORGE J. PERKINS, ESQ.

For Respondent:

JOHN H. WELCH, ESQ.

The Tax Court of the United States

Docket No. 39553

OREGON-WASHINGTON PLYWOOD COMPANY, an Oregon Corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (bureau symbols IT:90D:EEH) dated December 27, 1951, and as a basis of its proceedings alleges as follows:

(1) That the petitioner is an Oregon corporation and was such during all the calendar years 1944 and 1945. That during all of said years it was qualified to transact business in the State of Washington as a foreign corporation, and owned and operated a plywood plant at Tacoma, Washington. That its present general office is 1014 U. S. Bank Building, Portland (4), Oregon. The income and excess profit tax returns for the years in this proceedings involved, were filed with the United States Collector of Internal Revenue at Tacoma, Washington.

(2) The notice of deficiency (a copy of which together with the statements accompanying it are attached hereto marked Exhibit A) was mailed to the petitioner on the 27th day of December, 1951.

(3) The taxes in controversy are a deficiency of excess profit taxes determined for the calendar year ending December 31, 1944, in the amount of \$19,925.35, and an overassessment of income taxes for the same year in the amount of \$9,321.80.

(4) The determination of tax set forth in said notice of deficiency is based upon the following errors:

(A) By the Commissioner refusing to allow in the computation of excess profit credit on the basis of invested capital, 50 per cent of the average borrowed capital of the petitioner amounting to \$171,974.05 for the calendar year 1944, and amounting to \$130,746.55 for the calendar year 1945, evidenced by a promissory note executed by petitioner, dated September 30, 1943, payable to the order of Peterman Manufacturing Company, originally for \$400,000.00 and interest at the rate of 3% per annum, and secured by a purchase and sale contract of approximately 3500 acres of timberland, in Tillamook County, Oregon, which contract was in effect a real estate mortgage to secure payment of said note.

(B) By the Commissioner ruling and holding that said promissory note and contract did not create or evidence an unconditional promise to pay the amounts stated in said note and contract and

did not qualify as borrowed capital within the meaning of Section 719(a) of the Internal Revenue Code.

(C) By the Commissioner determining an additional excess profit tax in the amount of \$19,925.35 against the petitioner for the calendar year 1944.

(D) By the Commissioner disallowing a deduction from income in the year 1944 in the amount of \$10,318.44 designated as "Cost of logs from Peterman" (item (d), page 2, Exhibit A), and allowing an offsetting deduction in the same amount, \$10,318.44, designated as "Interest accrued" (item (i), page 2, Exhibit A).

(E) By the Commissioner in adjusting petitioner's income for the year 1945 (items (c), (d), (g) and (h), page 5, Exhibit A) as follows:

	<u>Commissioner's adjustments</u>	<u>Agreed to by petitioner</u>	<u>Error</u>
Increase or (decrease) in net income—			
(d) Deduction for anticipated freight	\$12,103.11	\$12,103.11	
(c) Cost of logs from Peterman	1,180.85)	
(h) Cost of logs used overstated	(5,457.86))	\$7,826.10
Decrease in closing inventory)	
		(12,103.11)	
(g) Accrued interest expense	(7,826.10)		(7,826.10)

(F) The Commissioner is in error in stating that the petitioner has agreed to the adjustments mentioned in the last two assignments of error.

(5) The facts on which the petitioner relies as the basis of this proceeding are as follows:

(A) The basis for the deficiency proposed is that the Commissioner, in his determination of the petitioner's excess profits tax credit, refused to allow credit for 50% of the petitioner's borrowed capital evidenced by a promissory note given by the petitioner to Peterman Manufacturing Company and secured by a purchase and sales contract of timberland. On August 30, 1943, petitioner entered into a written contract with T. A. Peterman and wife by which it agreed to purchase and they agreed to sell, approximately 3500 acres of timberland in Tillamook County, Oregon, at the agreed price of \$500,000.00. The petitioner agreed to pay for said timberland \$100,000.00 in cash on or before September 30, 1943, and give to Peterman Manufacturing Company its promissory note for \$400,000.00. Petitioner paid the \$100,000.00 and gave the note within said period. In the purchase contract petitioner unconditionally agreed to pay \$500,000.00 for the timberland and in the note it unconditionally agreed to pay to the order of Peterman Manufacturing Company \$400,000.00 together with interest on deferred balances at 3% per annum. The Petermans retained title to the land as security for the balance owing on the purchase price. Both the purchase contract and the note provide that payments on the principal of the note and accrued interest shall be made on the 15th day of each month, beginning with November, 1943, and

that the basis of the principal payments (meaning the amount of the monthly payments) to be the equivalent to \$5.00 per thousand feet for all logs, except wood logs, cut and removed from the land during the preceding calendar month. The purchase contract provides that no loss or destruction to any part or all of the property covered by the contract shall give ground for the termination of the contract or relieve purchaser (the petitioner) in whole or in part from any obligation imposed (meaning the obligation to pay the full amount of the note). It further provides that in the event of default that the Petermans may declare the whole amount owing due and bring suit therefor. A full and true copy of said note and contract are marked Exhibits B and C, respectively, attached to and made a part of this petition.

(B) That prior to the purchase of said timberland, a cruise was made of the timber thereon which showed in excess of 115 million feet of timber on said land suitable for making commercial plywood and saw mill logs.

(C) That as a part of the purchase transaction, and to assure Peterman Manufacturing Company that substantial monthly payments would be made on said note, petitioner entered into a contract with Peterman Manufacturing Company as loggers authorizing and requiring them to cut and remove all of the merchantable timber from said land at the rate of from twenty to twenty-five million feet per year and required them to commence logging in

October, 1943, and be in full operation by February, 1944.

* * *

(I) If the deficiency proposed by the Commissioner—\$19,925.35—is affirmed, it will result in an “overassessment” of income tax against the petitioner for the calendar year 1944, of \$9,321.80.

* * *

Wherefore, petitioner prays that this Court may hear the proceedings and set aside and vacate the whole of the deficiency determined or proposed by the Commissioner. But, in the alternative, if said deficiency is affirmed in whole or in part that the overassessment for the year 1944, be credited against or deducted from the same.

That the petitioner have such other, further and different relief as the Court may determine it is entitled to in the proceedings.

OREGON-WASHINGTON
PLYWOOD COMPANY,
Petitioner,

By /s/ HARRY T. NICOLAI,
President.

Duly verified.

Received and filed March 19, 1952, T.C.U.S.

Served March 20, 1952.

[Title of Tax Court and Cause.]

ANSWER

Comes Now the Commissioner of Internal Revenue, by his attorney, Mason B. Leming, Acting Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed herein, admits and denies as follows:

(1) Admits the allegations contained in paragraph (1) of the petition.

(2) Admits the allegations contained in paragraph (2) of the petition.

(3) Admits that the tax in controversy is a deficiency in excess profits tax for the calendar year ending December 31, 1944, in the amount of \$19,925.35. Denies the remaining allegations contained in paragraph (3) of the petition.

(4) (A) to (F), inclusive. Denies that the respondent committed any error in determining the deficiency as set forth in the notice of deficiency from which the appeal is taken, and specifically denies the allegations of error contained in subparagraphs (A) to (F), inclusive, of paragraph (4) of the petition.

(5)(A). Admits that the basis for the deficiency is respondent's reduction of the excess profits tax credit claimed by petitioner in its return, in that respondent disallowed as "borrowed, invested capital" amounts payable by petitioner under a timber purchase contract with the Peterman Manufactur-

ing Company and T. A. Peterman. Admits that copies of certain instruments executed in connection with said purchase are marked Exhibits B and C, respectively, and attached to the petition. Denies the remaining allegations contained in paragraph (5)(A) of the petition.

(B) For lack of sufficient information upon which to base an opinion as to the truth or correctness of the allegations contained in paragraph (5)(B) of the petition, the same are denied.

(C) Denies the allegations contained in paragraph (5)(C) of the petition.

(D), (E) and (F). Denies the allegations contained in paragraphs (5)(D), (E) and (F) of the petition.

(G) Admits that petitioner protested the deficiency proposed by the Commissioner and had various conferences with representatives of the commissioner. Denies the remaining allegations contained in paragraph (5)(G) of the petition.

For further answer to paragraph (5)(G) respondent alleges that the adjustments cited as error in paragraphs (4) (D), (E) and (F) and paragraph (5)(G) of the petition do not affect petitioner's tax liability and are not an issue in determining the deficiency in this proceeding.

(H) Admits that the excess profits tax net income of the petitioner for the taxable years 1944 and 1945 and the adjustments made to petitioner's income per the returns are as set forth in Exhibit D attached to the petition. Admits that the compu-

tation of liability of petitioner for excess profits tax for the years 1944 and 1945 are as shown in said Exhibit D. Denies the remaining allegations contained in paragraph (5)(H) of the petition.

(I) Admits that if the deficiency in excess profits tax proposed by the Commissioner in the amount of \$19,925.35 is affirmed, it will result in an overassessment in income tax against the petitioner for the calendar year 1944 in the amount of \$9,321.80. Denies the remaining allegations contained in paragraph (5)(I) of the petition.

(6) Denies generally and specifically each and every material allegation contained in the petition, not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the petitioner's appeal be denied and that the Commissioner's determination of deficiency be approved.

/s/ MASON B. LEMING,

Acting Chief Counsel, Bureau
of Internal Revenue.

Of Counsel:

WILFORD H. PAYNE,
District Counsel.

DOUGLAS L. BARNES,
JOHN H. WELCH,
Special Attorneys, Bureau of
Internal Revenue.

Received and filed May 5, 1952, T.C.U.S.

Served May 12, 1952.

The Tax Court of the United States

Docket No. 39553

OREGON-WASHINGTON PLYWOOD COM-
PANY, an Oregon Corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated July 10, 1953

FINDINGS OF FACT AND OPINION

Excess Profits Credit—Borrowed Invested Capital. Held, that a land purchase contract and so-called note executed pursuant thereto were conditional and that the obligation under such instruments was not an outstanding indebtedness evidenced by either a note or a mortgage, within the meaning of section 719 (a) (1), Internal Revenue Code.

For the Petitioner:

GEORGE J. PERKINS, ESQ.

For the Respondent:

JOHN H. WELCH, ESQ.

The respondent has determined an excess profits tax deficiency of \$19,925.35 against the petitioner for the calendar year 1944.

The issue presented is whether, in determining the excess profits credit based upon the invested

capital method, the petitioner's obligation for the balance due under a contract for purchase and sale of timberlands and an alleged promissory note executed pursuant to that contract, constitutes an outstanding indebtedness evidenced by a note or mortgage which may be included in borrowed capital for the years 1944 and 1945, within the meaning of section 719 (a) (1), Internal Revenue Code.

It is stipulated that, if the Court finds for the petitioner on the issue involved, the amount claimed as representing 50 per cent of the average daily borrowed capital as set forth in each of the petitioner's excess profits tax returns for 1944 and 1945, respectively, is correct and there is no deficiency in excess profits tax for 1944. It is further stipulated that if the deficiency involved herein is sustained, it will result in an overassessment of \$9,321.80 in income tax for the year 1944.

This proceeding has been submitted upon the pleadings and a stipulation of facts including numerous exhibits made a part thereof.

Findings of Fact

The stipulated facts are so found and included herein by reference.

The petitioner is an Oregon corporation which, during the years material herein, was qualified to transact business in the State of Washington, as a foreign corporation. The petitioner's income and excess profits tax returns for the taxable years 1944 and 1945 were filed with the collector of internal revenue for the district of Washington.

At all times material to this proceeding the petitioner owned and operated a plywood manufacturing plant at Tacoma, Washington, and in that vicinity there was a scarcity of raw material, namely, peeler logs.

On July 30, 1941, T. A. Peterman acquired title by deed to approximately 3,500 acres of timberland in Tillamook County, Oregon, and he had not conveyed or encumbered the same prior to the execution of a contract of purchase and sale dated August 30, 1943, hereinafter mentioned. That tract of timberland was cruised in December, 1940, and January, 1941, and the timber cruiser's report showed an estimated total of 109,528,000 feet of merchantable timber. The tract contained a large amount of dead timber which had been killed by a forest fire and the time for using the dead timber as peeler logs was limited. During 1943 and until November 16, 1944, T. A. Peterman, Katherine Peterman and Gladys Peterman were partners doing business under the firm name of Peterman Manufacturing Company which owned a large amount of logging equipment and maintained a logging organization in the area of the above-mentioned tract of timberland. The petitioner had no logging equipment or facilities for logging timber.

On August 30, 1943, T. A. Peterman and his wife as owners and the petitioner as purchaser executed a contract of purchase and sale of the above-mentioned 3,500-acre tract of timberland in Tillamook County, Oregon. The agreed purchase price was

\$500,000 payable \$25,000 on date of the contract, \$75,000 on or before September 30, 1943, and the balance of \$400,000 "evidenced by a note made payable" to Peterman Manufacturing Company and delivered thereto on or before September 30, 1943. Payments on the note, plus accrued interest at the rate of three per cent per annum on deferred balances, were due on the 15th day of each month beginning November 15, 1943, on the basis of \$5 per thousand feet, commercial log scale, cut and removed by the purchaser during the previous month. If the purchaser defaulted in the monthly payments logging operations were to cease until the default was made good. The purchaser agreed, inter alia, that it would conduct its operations on the lands in a good and workmanlike manner in accordance with the best methods and usages practiced in the Douglas Fir area and the Oregon laws and regulations; that it would pay all taxes and assessments levied upon the lands; that it would scale the logs cut and removed and keep accurate records; and that no loss or destruction of, nor injury or damage to any part or all of the property from fire, wind, or other element or casualty whatsoever would give ground for the termination or rescission of the contract or relieve the purchaser of its obligations thereunder. The contract further provided that "time is of the essence of this contract and each and every portion thereof" and that in case of purchaser's default in payments or performance of other terms of the contract and after certain notice, the owners may elect to declare the

contract at an end with all payments and improvements on the property forfeited as liquidated damages, or the owners may elect to declare all unpaid sums plus accrued interest immediately due and payable and bring suit therefor. Further, the owners reserved title to the lands and timber thereon until complete performance of the contract by the purchaser but title to the logs passed to the purchaser as they were cut and removed from the land. Upon completion of the purchaser's obligations under the contract the owners agreed to execute and deliver a deed to the timberlands in fee simple with covenants of warranty and good commercial abstract or title insurance in a sum equal to the price paid for the land subject to certain existing record reservations and easements.

The petitioner made the cash payments totaling \$100,000 required by the contract of August 30, 1943, and on September 30, 1943, delivered the following note as provided in that contract:

Tacoma, Washington, September 30, 1943.

\$400,000.00

As provided in an agreement dated August 30, 1943, the undersigned for value received promises to pay to the order of the Peterman Manufacturing Company the sum of Four Hundred Thousand Dollars (\$400,000.00) in lawful money of the United States of America. Payments on this note plus accrued interest at the rate of 3% per annum on deferred balances shall be made on the 15th day of each month beginning November 15, 1943.

The basis of such principal payments to be \$5.00 per thousand feet commercial log scale for all logs except wood logs cut and removed by purchaser or its agents during the previous calendar month as provided in the agreement between T. A. Peterman and Ida C. Peterman, owners, and Oregon-Washington Plywood Company, purchaser, dated August 30, 1943, covering certain timber lands in Tillamook County, Oregon.

OREGON-WASHINGTON PLYWOOD
COMPANY,

By /s/ PHILIP GARLAND,
Vice President.

Attest:

/s/ MATHILDA M. BARRETT,
Secretary.

On September 18, 1943, the Peterman Manufacturing Company executed a written agreement with the petitioner whereby for certain agreed prices to be paid by the petitioner, the former agreed, *inter alia*, to furnish all equipment and labor and pay all costs for logging all merchantable timber on the above-mentioned 3,500-acre tract for the petitioner. The Peterman Manufacturing Company further agreed to log an annual average of from twenty to twenty-five million feet a year until all of the timber be logged from the tract, to commence shipping logs in October and to be in full production by February, 1944.

On September 30, 1943, the Peterman Manufac-

turing Company executed an additional agreement with the petitioner to purchase at certain prices all logs cut other than the fir peeler logs and certain fir sawmill logs needed by the petitioner.

T. A. Peterman died on November 16, 1944. Thereafter the surviving partners, the decedent's wife and executors of the decedent's estate, desired to be relieved of the agreements mentioned in the next two preceding paragraphs as to logging operations and the purchase of logs, and they were terminated by a cancelation agreement dated January 4, 1946, between the interested parties and the petitioner. Also, on January 4, 1946, the same interested parties and the petitioner executed an amendment to the above-mentioned contract dated August 30, 1943, whereby, inter alia, the balance of the purchase price of the said timberland of approximately \$241,000 owing by the petitioner under the August 30, 1943, contract and September 30, 1943, note, would be paid as follows: a minimum payment of \$5,000 on June 1, 1946, and the first of every succeeding month thereafter until the principal of the note was paid in full, plus additional payments "to be credited on the aforesaid note and contract" at the rate of \$5 per thousand feet cut in excess of seven million feet during 1946 and twelve million feet during any subsequent calendar year. Furthermore, the interest provided for in the August 30, 1943, contract and note thereunder was expressly waived and it was agreed that no interest would be charged or collected "on the

balance owing on the aforesaid indebtedness or on said note." Except as so amended the August 30, 1943, contract remained in full force and effect.

On January 4, 1946, the petitioner entered into a contract with the firm of Yunker and Wiecks for the cutting of timber on the above-mentioned 3,500-acre tract.

The petitioner's records show that 90,933,000 feet of timber were logged from the land between August 30, 1943, and August 31, 1952. The petitioner's above-mentioned note for \$400,000 dated September 30, 1943, was paid in full sometime prior to December 22, 1949, on which date the petitioner acquired legal title to the 3,500-acre tract of timberland by warranty deed from the heirs of T. A. Peterman.

Opinion

Tietjens, Judge:

The issue presented is whether under the facts herein the petitioner had, during the years 1944 and 1945, an "outstanding indebtedness" which was "evidenced by" a "note" or "mortgage" within the meaning of section 719 (a) (1), Internal Revenue Code.¹ If so, there is no dispute as to the amounts to be included in the petitioner's borrowed capital for those years.

The petitioner contends that, during 1944 and 1945, its obligation to pay the balance due on the agreed purchase price of timberland constituted an

¹Sec. 719. Borrowed Invested Capital.

(a) Borrowed Capital.—The borrowed capital for any day of any taxable year shall be determined

unconditional outstanding indebtedness which was evidenced by a promissory note secured by a land purchase contract which was a form of mortgage under the laws of Oregon. The petitioner further contends that title to the land was retained by the seller only as security and that, in Oregon, the land purchase contract created a lien on the property equivalent to the common form of mortgage.

The respondent contends that the transaction involved herein did not create an outstanding indebtedness evidenced by either a note or a mortgage within the meaning of section 719 (a) (1), *supra*. He argues that the petitioner's obligation was conditional under the terms of an executory and bilateral agreement, that the agreement was a conditional land contract with the seller retaining title and was not a "mortgage" or even equivalent to one, and, further, that the instrument promising to pay \$400,000 was not a "note" because there was no due date and the monthly payments called for were to be made on the basis of the quantity of

as of the beginning of such day and shall be the sum of the following:

(1) The amount of the outstanding indebtedness (not including interest) of the taxpayer which is evidenced by a bond, note, bill of exchange, debenture, certificate of indebtedness, mortgage, or deed of trust, plus,

* * *

(b) Borrowed Invested Capital.—The borrowed invested capital for any day of any taxable year shall be determined as of the beginning of such day and shall be an amount equal to 50 per centum of the borrowed capital for such day.

timber cut and removed by the petitioner. The respondent argues that the situation in the instant case is almost identical to that in *Consolidated Goldacres Co. v. Commissioner*, 165 F. 2d 542, affirming 8 T.C. 87, certiorari denied 334 U.S. 820. Among other cited cases the respondent also relies heavily upon *Bernard Realty Company v. United States*, 188 F. 2d 861, reversing 92 F. Supp. 805; and *Journal Publishing Company*, 3 T.C. 518, to support his position that his determination should be sustained.

In each of the above-cited cases the taxpayer's obligation to pay a sum of money was evidenced by a written contract. In the first two cited cases it was held that the contract did not constitute either a "mortgage" or a "note" and in the third cited case it was held that the contract did not constitute a "note" or otherwise qualify as evidence of indebtedness, within the intent of Congress in enacting section 719 (a) (1), *supra*. In the instant case one distinguishing circumstance not involved in the cited cases is that in addition to the land purchase contract the petitioner executed an instrument purporting to be a promissory note. However, that factual distinction does not obviate the applicability of the reasons and conclusions set forth in the cited cases which we think determine the instant controversy.

The concept of including in invested capital certain amounts of outstanding indebtedness as borrowed capital and the restricted character of the permissible evidence of such indebtedness which

Congress has prescribed in section 719 (a) (1), has been heretofore fully discussed in the above-cited cases and Flint Nortown Theatre Co., 4 T.C. 536; West Construction Co., 7 T.C. 974; Canister Co., 7 T.C. 967, affd. 164 F 2d 579; and C. L. Downey Co., 10 T.C. 837, affd. 172 F. 2d 810. There is no need here for further discussion along that line.

In the instant case the agreement of August 30, 1943, wherein the seller retained title to the land and standing timber thereon until payment in full of the agreed purchase price by the petitioner, was a conditional land contract. The purchase price of \$500,000 was payable \$100,000 in cash and the balance during an indefinite period of time by monthly payments conditioned upon the quantity of timber cut and removed by the petitioner. In addition to the conditional monthly payments, there were numerous other conditions which the petitioner was required to meet in order to fulfill the terms of the contract. Default in any of those conditions gave the seller the option to declare the contract terminated and all payments forfeited as liquidated damages, or, declare the unpaid sums plus interest immediately due and payable and bring suit therefor. Under the contract the petitioner was obligated to pay the balance of the purchase price but that obligation was not unconditional for at any time a breach of the terms and the seller's election to terminate the contract would have relieved the petitioner of any further liability. Even though the land contract may be the equivalent of a mortgage for certain remedial purposes

under the laws of Oregon, as contended by the petitioner, the controlling fact here is that the contract was conditional and therefore does not qualify as a "mortgage" within the meaning and for the purpose of section 719 (a) (1). A land contract or other conditional sales contract is not synonymous with and therefore may not be considered as a "mortgage" under that section. *Consolidated Goldacres Co. v. Commissioner, supra*, and *Bernard Realty Company v. United States, supra*.

The petitioner further contends that even if the contract fails to qualify as a "mortgage" the instrument executed as a note pursuant to the contract, is an entirely separate instrument which qualifies as a "note" under section 719 (a) (1). In our opinion, the so-called note must be read with its interrelated contract and when so read a close analysis of both instruments discloses that there was no unconditional promise to pay a certain sum of money on demand, or at a fixed or determinable future time. *Journal Publishing Co., supra*. While it is true that the so-called note "promises to pay to the order of" a payee the sum of \$400,000 in money, it is also true that it is not payable on demand nor at any designated or ascertainable future time. The so-called note refers to the contract and incorporates language providing for monthly payments on the basis of the quantity of timber cut and removed by the petitioner and accordingly it is conditional. By its very terms the instrument purporting to be a note is payable in instalments, the

amounts of which are not fixed, and we do not agree with the petitioner's contention that the so-called note should be deemed payable in a reasonable time and if not so paid would become a demand note.

We conclude that the petitioner's obligation during the years 1944 and 1945 under the instruments involved herein, was not an outstanding indebtedness evidenced by a note or mortgage within the meaning of section 719 (a) (1), *supra*. The respondent's determination is sustained.

Decision will be entered for the respondent.

Served July 10, 1953.

The Tax Court of the United States
Washington

Docket No. 39553

OREGON-WASHINGTON PLYWOOD COMPANY,
an Oregon Corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion promulgated July 10, 1953, it is

Ordered and Decided: That there is a deficiency in excess profits tax for the calendar year 1944 in the amount of \$19,925.35.

/s/ NORMAN O. TIETJENS,
Judge.

Entered July 21, 1953.

Served July 21, 1953.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed, by and between the parties to this proceeding, through their respective counsel, that the following facts are true and may be accepted for purposes of determining the issue in controversy, reserving either party the right to present other and further evidence not inconsistent with the facts hereinafter set forth:

1. Petitioner is an Oregon corporation and was such during the calendar years 1944 and 1945. Petitioner was qualified during said years to transact business in the State of Washington as a foreign corporation, and owned and operated a plywood manufacturing plant at Tacoma, Washington. Petitioner's income and excess profits tax returns for the taxable years 1944 and 1945 were filed with the Collector of Internal Revenue for the District of Washington. The original returns may be offered

by respondent and received in evidence and identified as follows:

- Exhibit A—Excess Profits Tax Return—1944
- Exhibit B—Excess Profits Tax Return—1945
- Exhibit C—Income Tax Return —1944
- Exhibit D—Income Tax Return —1945

2. The notice of deficiency (a copy of which is attached to the petition and marked Exhibit A) was mailed to the petitioner on December 27, 1951. In this notice, respondent determined a deficiency in excess profits tax in the amount of \$19,925.35 for the calendar year 1944. The deficiency is based upon the disallowance by respondent of certain amounts claimed by petitioner as borrowed capital for the years 1944 and 1945. Petitioner, on its returns for said years, took into account fifty per cent of the daily average, in computing its excess profits credit based upon the invested capital method of computing the said credit.

3. The amounts of the claimed borrowed capital so disallowed were \$171,974.05 for 1944 and \$130,746.55 for 1945. These amounts are fifty per cent of the average daily balance claimed by petitioner under the terms and conditions of agreements entered into between it and T. A. and Ida C. Peterman, husband and wife, and with the Peterman Manufacturing Company, hereinafter further described.

4. The issue in controversy is dependent upon the determination of the legal effect of an agreement entered into between petitioner and Peterman

Manufacturing Company, and an agreement between petitioner and T. A. and Ida C. Peterman, husband and wife, and whether these agreements create and evidence borrowed capital within the meaning of the Internal Revenue Code. If the Court orders that they do, Petitioner's computations of its claimed average daily balances of borrowed capital are correctly set forth in its excess profits tax returns identified herein as Exhibits A and B and there would be no deficiency in excess profits tax. If they do not, the deficiency in excess profits taxes is correctly stated in the statutory notice of deficiency. If the deficiency in excess profits tax determined by the respondent in the amount of \$19,925.35 is affirmed, it will result in an overassessment in income tax for the year 1944 in the amount of \$9,321.80.

5. There may be offered and received in evidence by the petitioner an agreement between petitioner, as one contracting party, and T. A. Peterman and Ida C. Peterman, husband and wife, as the other contracting parties, relating to certain timber lands located in the State of Oregon which may be identified as Exhibit 1. There may be offered and received in evidence an instrument which is identified as Exhibit 2 and a letter signed by T. A. Peterman dated October 18, 1943, which may be admitted in evidence and identified as Exhibit 3. The execution of Exhibits 1 and 2 and the signing and delivery of Exhibit 3, which is a letter, are admitted and may be received in evidence for the

purposes of determining the issue in controversy. T. A. Peterman acquired title to the land, described in Exhibit 1, by deed on July 30, 1941, and had not conveyed or encumbered the same prior to the time the aforesaid agreements were executed. The above are the instruments referred to in the preceding paragraph.

6. T. A. Peterman, Katherine Peterman and Gladys Peterman were partners during 1943 and during 1944 until the death of T. A. Peterman on November 16, 1944. The partnership did business under the firm name of Peterman Manufacturing Company. A copy of an agreement between petitioner and Peterman Manufacturing Company may be offered in evidence by petitioner and identified as Exhibit 4. Respondent admits that this is a true and correct copy of the original.

7. Petitioner was engaged in the manufacture and sale of plywood at the time said agreements were made. The raw material for plywood is peeler logs. A scarcity of peeler logs existed in the vicinity of Tacoma, Washington. The agreement, identified as Exhibit 1, was made to obtain a supply of peeler logs.

8. The land described in Exhibit 1, contained a large amount of dead timber, which had been killed by a forest fire several years prior to the date of the agreement. The time for using the dead timber as peeler logs was limited. Petitioner's records show that 90,933,000 feet of timber have been logged from the land between August 30, 1943, and

August 31, 1952. Between December, 1940, and January, 1941, a cruise was made on the land by one F. A. Veitschegger, whose cruise report showed an estimated total of 109,528,000 feet of merchantable timber on the land.

9. T. A. Peterman died during November, 1944. The surviving partners of T. A. Peterman, and his executors desired to be relieved of the agreement identified as Exhibit 4, and the same was cancelled as indicated by Exhibit 6, hereinafter referred to. Petitioner negotiated with others and subsequently entered into agreements dated January 4, 1946, copies of which may be offered in evidence and received and identified as Exhibits 5, 6 and 7. Exhibit 6 refers to an understanding in the form of a letter dated September 27, 1943, which may be admitted in evidence and identified as Exhibit 8.

10. Peterman Manufacturing Company owned a large amount of logging equipment and maintained a logging organization in the area of the timber described in Exhibit 1. Petitioner had no logging equipment or facilities for logging timber. The agreement identified as Exhibit 1 was executed by the parties to the same on August 30, 1943, and Exhibit 2 was signed and delivered by petitioner September 30, 1943. Both instruments relate to the same transaction. Prior to the time petitioner signed and delivered the instrument described as Exhibit 2, it had paid to T. A. Peterman, pursuant to the agreement identified as Exhibit 1, \$100,000 in money.

11. Petitioner acquired legal title to the timber land described in Exhibit 1 by warranty deed from the heirs of T. A. Peterman on December 22, 1949, and petitioner had paid the amount stated in Exhibit 2 prior to this time, with the exception of interest, which was not paid after January 1, 1944. A copy of a letter from George Rakins, accountant for T. A. Peterman, to Philip Garland, Secretary of petitioner at the time, referring to "Al" who is T. A. Peterman, describes the circumstances for waiving the interest, may be admitted in evidence as respondent's Exhibit E.

/s/ GEORGE J. PERKINS,
Counsel for Petitioner.

/s/ CHARLES W. DAVIS,
Chief Counsel, Bureau of Internal Revenue.

[All of the exhibits mentioned in the Stipulation of Facts were received in evidence by the Tax Court.]

PETITIONER'S EXHIBIT 1

Agreement

T. A. Peterman and Ida C. Peterman, husband and wife, of Tacoma, Washington, hereinafter called Owners, hereby and herein agree to sell to Oregon-Washington Plywood Company, an Oregon Corporation, having its principal office and place of business at Tacoma, Washington, hereinafter called Purchaser, and the Purchaser hereby and herein

agrees to buy from the Owners, all the following described timberlands in Tillamook County, Oregon, listed in Exhibit A hereto attached and by this reference made a part hereof, upon the following mutually agreed terms and conditions:

1. That the Purchaser will pay to the Owners at Tacoma, Washington, for said timberlands, the sum of Five Hundred Thousand Dollars plus interest at 3 per cent per annum on deferred balances, payable as follows:

- (a) \$25,000.00 on the date hereof,
- (b) \$75,000.00 on or before September 30, 1943,
- (c) The balance of the purchase price in the sum of Four Hundred Thousand Dollars (\$400,000.00) shall be evidenced by a note made payable to the Peterman Manufacturing Company and placed in their hands on or before September 30, 1943. Payments on this note, plus accrued interest at the rate of three per cent (3%) per annum on deferred balances, shall be made on the Fifteenth day of each month beginning with November 15, 1943. The basis of such principal payments to be Five Dollars (\$5.00) per thousand feet, commercial log scale, for all logs except wood logs cut and removed therefrom by purchaser or its' agents during the previous calendar month. Such monthly payments to be accompanied by a written report showing the commercial log scale of logs so cut and removed.

If the Purchaser shall fail to make the payments above provided for on the 15th day of any month, and within five (5) days after the mailing of a

written demand therefor, addressed to it at Tacoma, Washington, it shall cease all logging operations upon any of the lands or in any of the timber hereinabove described, and shall not again resume such logging operations until it shall have made good the amount of such default, with interest thereon at the rate of 3% per annum from the date when such stumpage payment became due, and shall have paid any and all costs of whatsoever kind or nature, including attorney's fees, which the owner may have incurred or been put to in order to compel the Purchaser to refrain from and cease logging operations, the Purchaser hereby covenanting and agreeing that in such event it will, as a condition precedent to its right to resume logging operations, make good any and all defaults and stumpage payments, with interest, as above expressed, and will pay any and all costs incurred by the Owner, including attorney's fees.

2. That the Purchaser will conduct its operations hereunder in a good and workmanlike manner and in accordance with the best methods and usages practiced in the Douglas Fir area; that it will comply with any and all laws and regulations of the State of Oregon relating to safety appliances and equipment, fire supervision, patrol and equipment, and slash disposal; that it will pay before delinquency any and all taxes and assessments levied and assessed upon said lands beginning with those first becoming due and payable in November, 1943; that logs cut and removed shall be scaled by a scaler satisfactory to both parties; that it will keep accu-

rate records and accounts of its operations under this contract, and that the Owners shall have the right, by their agents or attorneys, at any and all times, to examine such records, or to take a copy and account of the logging operations of the Purchaser to the end that they may check and determine the amount of timber cut from time to time and the payments due or to become due in consequence thereof; that it will protect and save harmless the Owners from any and all claims of any kind and nature occasioned by or arising out of the conduct of its operations hereunder; that no loss or destruction of, nor injury or damage to any part or all of the property covered hereby, from fire, wind or other element or casualty whatsoever shall give ground for the termination or rescission of this contract or relieve the Purchaser in whole or in part from any of the obligations hereby imposed on or herein assumed by it; that all payments which the Purchaser is required hereunder to make to the Owners, shall be made payable and paid, to the Peterman Manufacturing Company, address Post Office Box 1576 in Tacoma, Washington, until otherwise specified in writing; that any buildings or improvements which shall hereafter be placed on said lands by the Purchaser, shall not be removed therefrom prior to completion of this agreement; that it will not assign this agreement, or any interest therein, without the written consent of Owners to do so being first had and obtained.

3. Any notice required hereby or provided for herein may be given either by the delivery of the

same to the Owners or to any officer of the Purchaser in person, as the case may be, or by mailing the same to the party to whom such notice is to be given, in sealed envelope, with the postage thereon fully prepaid, directed to such party at the post office address below given, and such notice shall be deemed complete when delivered or when deposited in the United States mails, as the case may be.

4. The time is of the essence of this contract and each and every portion thereof. In case the Purchaser shall make default, (a) in the payment of any sum owing by it to the Owners on the date the same becomes due, and such default shall continue for ten (10) days after written notice thereof be given by the Owners to the Purchaser, or, (b) in performance of any other term, condition or provision contained in this agreement, and such default shall continue for thirty (30) days after written notice thereof be given by the Owners to the Purchaser, then and in either or any of such events the Owners may in their option either elect to declare this contract at an end and all rights of the Purchaser thereunder terminated, in which event all payments theretofore made by the Purchaser, as well as all improvements made upon said lands, shall be forfeited to the Owners and become and remain their property absolutely as liquidated damages; or, the Owners may declare all sums unpaid upon said contract, together with all interest accrued to the date of the expiration of such notice, immediately due and payable, and shall be entitled upon expiration of said ten-day period or said

thirty-day period, as the case may be, to bring suit therefor without further or other notice or demand.

5. The Owners reserve unto themselves, until complete performance hereof by the Purchaser, title to said lands and the timber thereon. But when logs or other forest products shall be removed from said lands, the title to such logs or forest products shall then pass to the Purchaser and the sale thereof be deemed absolute, and the Owners shall have, in addition to remedies provided for herein, such stumpage lien or other remedy in connection therewith as is now or may hereafter be given by the laws of the State of Oregon.

6. When the Purchaser shall have completed performance of the obligations herein assumed by it, and request a deed to the lands included herein, the Owners shall promptly execute and deliver to Purchaser a deed conveying to it said lands in fee simple with covenants of special warranty, save and except taxes and incumbrances, if any, created by the acts or omissions of the Purchaser hereunder, existing reservations of record and easements for telephone and telegraph lines, public roads and trails; provided, however, that if the Owners' title to said lands should fail, they shall be liable only for the sums paid hereunder by Purchaser, and no more, plus interest at 3% per annum thereon; should such title to a portion of said lands fail, said liability shall be limited to the value of such portion set out in the records of the Owners relating thereto.

Provided, should title in the Owners herein

named to any of said land fail after the Purchaser has cut or removed any timber therefrom, said Owners will pay to the Purchaser any damage which it may sustain on account of having cut or removed the timber from said land.

When said land has been paid for, Owners will furnish Purchasers with good commercial abstract or title insurance in a sum equal to the price paid for said land showing good marketable title in the Owners subject only to the exceptions herein above mentioned.

It is understood the Owners will pay any revenue or tax stamps lawfully required on the deeds to said property.

In Execution Hereof, the Owners have hereunto affixed their hands and seals, and the Purchaser has caused its corporate name and seal to hereunto be subscribed and affixed and this agreement to be executed in duplicate originals by its Officers thereunto duly authorized this 30th day of August, 1943.

Owners:

/s/ T. A. PETERMAN,

/s/ IDA C. PETERMAN.

Purchaser:

OREGON-WASHINGTON
PLYWOOD COMPANY.

/s/ HARRY T. NICOLAI,
President.

Attest:

/s/ MATHILDA M. BARRETT,
Secretary.

State of Washington,
County of Pierce—ss.

This Is to Certify, that on this 30th day of August, 1943, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally came T. A. Peterman and Ida C. Peterman, his wife, of Tacoma, Washington, and to me known to be the individuals described in and who executed the within and foregoing agreement, and acknowledged to me that they signed and sealed the same as their free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal the day and year in this certificate above written.

[Seal] /s/ J. P. PATTEN,
Notary Public in and for the State of Washington,
Residing at Seattle.

State of Washington,
County of Pierce—ss.

This Is to Certify, that on this 30th day of August, 1943, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally came Harry T. Nicolai and Matilda Barrett, to me known to be the President and Secretary, respectively, of Oregon-Washington Plywood Company, a corporation, that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and

voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument and that the seal affixed thereunto is the corporate seal of said corporation.

Witness my hand and official seal the day and year in this certificate first above written.

[Seal] /s/ ROBERT M. LEE,

Notary Public in and for the State of Washington,
Residing at Tacoma.

EXHIBIT A

List of Timberlands in Tillamook County, Oregon, referred to in, and made a part of, that certain contract dated August 30, 1943, by and between T. A. Peterman and Ida C. Peterman, Owners, and Oregon-Washington Plywood Company, an Oregon Corporation, Purchasers.

The South half of the Northeast quarter ($S\frac{1}{2}$ of $NE\frac{1}{4}$), the Southeast quarter of the Northwest quarter ($SE\frac{1}{4}$ of $NW\frac{1}{4}$), Lots 2, 3, and 4, the East half of the Southwest quarter ($E\frac{1}{2}$ of $SW\frac{1}{4}$), and the Southeast quarter ($SE\frac{1}{4}$), of Section 31; the Southwest quarter ($SW\frac{1}{4}$) of Section 32; all in Township 2 South, Range 7 West of the Willamette Meridian;

The Southeast quarter ($SE\frac{1}{4}$) of Section 25; all of Section 26; the East half ($E\frac{1}{2}$), and the East half of the West half ($E\frac{1}{2}$ of $W\frac{1}{2}$), of Section 27; the Northeast quarter ($NE\frac{1}{4}$) of Section 34; and

all of Section 36; All in Township 2 South, Range 8 West of the Willamette Meridian;

The Northwest quarter (NW $\frac{1}{4}$) of Section 5; and all of Section 6; all in Township 3 South, Range 7 West of the Willamette Meridian;

The North half of the North half (N $\frac{1}{2}$ of N $\frac{1}{2}$), being Lots 1, 2, 3 and 4, and the South half of the North half (S $\frac{1}{2}$ of N $\frac{1}{2}$), of Section 2; and the Northwest quarter (NW $\frac{1}{4}$) of Section 12; all in Township 3 South, Range 8 West of the Willamette Meridian.

PETITIONER'S EXHIBIT 2

Tacoma, Washington, September 30, 1943.

\$400,000.00

As provided in an agreement dated August 30, 1943, the undersigned for value received promises to pay to the order of the Peterman Manufacturing Company the sum of Four Hundred Thousand Dollars (\$400,000.00) in lawful money of the United States of America. Payments on this note plus accrued interest at the rate of 3% per annum on deferred balances shall be made on the 15th day of each month beginning November 15, 1943.

The basis of such principal payments to be \$5.00 per thousand feet commercial log scale for all logs except wood logs cut and removed by purchaser or its agents during the previous calendar month as provided in the agreement between T. A. Peterman and Ida C. Peterman, owners, and Oregon-Washington Plywood Company, purchaser, dated August

30, 1943, covering certain timber lands in Tillamook County, Oregon.

[The word "Cancelled" appears in longhand, over the typewritten matter of the foregoing paragraphs, on the original exhibit.]

[Seal] OREGON-WASHINGTON
 PLYWOOD COMPANY,

By /s/ PHILIP GARLAND,
 Vice-President.

Attest:

/s/ MATHILDA M. BARRETT,
 Secretary.

Assigned on September 30, 1947, without recourse or warranty, an undivided one-half to Ida Christine Peterman, and the other undivided one-half to Gladys Peterman.

PETERMAN MANUFACTURING COMPANY,
a Partnership.

By /s/ KATHERINE T. PETERMAN,
 General Partner;

By /s/ GLADYS PETERMAN,
 General Partner;

ESTATE OF T. A. PETERMAN,
Deceased,
 General Partner;

By /s/ GEORGE N. RAKNES and
 /s/ IDA CHRISTINE PETERMAN,
 Duly Qualified Non-Interven-
 tion Co-Executors.

Filed October 17, 1952.

PETITIONER'S EXHIBIT No. 9

Excerpts From Minutes of Special Meeting of
Directors Oregon-Washington Plywood Com-
pany Held November 4th, 1943

* * *

Mr. Nicolai explained fully to the Directors the contract which had been entered into between T. A. Peterman and the Oregon-Washington Plywood Company, for the acquisition of timber and timberlands near the Tillamook area in Oregon, and submitted for their study and consideration contract negotiated for the purchase of those timberlands, the contract whereby Mr. Peterman agreed to log these lands for the Oregon-Washington Plywood Company, and the contract whereby he agreed to repurchase from the Oregon-Washington Plywood Company such reject and sawmill logs as the Company was not able to use in its own operation. He also submitted for the Director's examination copy of a note dated September 30, 1943, in the sum of \$400,000.00, which note, together with advanced cash payments already made, would complete the payment for said timber and timberlands.

After careful study of all of these documents, it was moved * * * and seconded * * * that the Directors approve these contracts in full as submitted, and on roll-call the Directors unanimously did approve these contracts as executed.

* * *

/s/ PHILIP GARLAND,

Acting Secretary of Meeting.

Admitted in evidence October 17, 1952.

[Title of Tax Court and Cause.]

PETITION FOR REVIEW BY UNITED
STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

The Oregon-Washington Plywood Company, an Oregon corporation, respectfully petitions for review by the United States Court of Appeals for the Ninth Circuit, of the decision in the above-entitled proceedings of the Tax Court of the United States, by Honorable Norman O. Tietjens, one of the judges of said Court, entered July 21, 1953, determining that there is a deficiency in the excess profits tax of the petitioner for the calendar year 1944, in the amount of \$19,925.35, and Alleges:

Nature of Controversy

The Commissioner of Internal Revenue determined, and gave notice to petitioner of a deficiency in the excess profits tax of the petitioner for the calendar year 1944, in the amount of \$19,925.35. The notice stated that if the deficiency is sustained it would result in overassessment in the income tax of petitioner for the same year of \$9,321.80. The Tax Court was petitioned to redetermine the alleged deficiency. It sustained the determination of the Commissioner.

The basis for the alleged deficiency is the Commissioner's refusal to allow credit taken by the petitioner for 50 per cent of its borrowed capital, evidenced by a promissory note given by petitioner to Peterman Manufacturing Co., and secured by a

purchase and sales contract of timberland situated in Tillamook County, Oregon. 50% of the amount owing on said note and contract in the year 1944, was \$171,974.05 and in the year 1945, \$130,746.55. The Commissioner contended (and was sustained by the Tax Court) that said contract and note did not create, and was not evidence of, an unconditional obligation of the petitioner to pay any specific amount, and that the petitioner could not take credit for said indebtedness or any part of it as borrowed invested capital in the computation of its excess profits tax in the year 1944. Petitioner contends that said purchase and sales contract was in effect a real estate mortgage under the laws of the State of Oregon, to secure the debt owing for the purchase price of timberland; that both said mortgage and note evidenced an unconditional obligation of the petitioner to pay Peterman Manufacturing Co., or order \$400,000.00 and that it rightfully took credit for 50 per cent, of the amount owing thereon in the years 1944 and 1945 in computing its excess profits tax for the calendar year 1944, and that there is no deficiency in its excess profits tax for that year.

Venue

Petitioner is now and was during all of the calendar years 1944 and 1945, an Oregon corporation. During all of the years 1944 and 1945, petitioner owned and operated a plywood plant and maintained a general office and place of business at Tacoma, in Pierce County, State of Washington,

and was qualified to transact business as a foreign corporation in the State of Washington. For the calendar years 1944 and 1945, it filed its income and excess profits tax returns with and paid its income and excess profits tax to the U. S. Collector of Internal Revenue at Tacoma, Washington.

Assignment of Error

The Tax Court erred in the following particulars:

(1) In concluding and determining that said purchase and sales contract of timberland situated in the State of Oregon, which was executed by petitioner as vendee and T. A. Peterman and wife, as vendors was not, under the laws of the State of Oregon, in effect a real estate mortgage to secure the payment of the promissory note given by petitioner to Peterman Manufacturing Co., for the sum of \$400,000.00, and in concluding and determining that neither said note or contract evidenced an unconditional obligation of the petitioner to pay the full sum of \$400,000.00 or any specific amount.

(2) In concluding and determining that said contract and note did not create and were not evidence of borrowed invested capital of the petitioner within the meaning of Section 719 (a) (1) of the Internal Revenue Code in effect in the calendar years 1944 and 1945, and that petitioner in computing its excess profits tax for the calendar year 1944, did not have the legal right to take credit for 50 per cent of its borrowed invested capital evidenced by the aforesaid promissory note and contract.

(The latter in effect a real estate mortgage to secure payment of said note.)

(3) By determining a deficiency in the excess profits tax of the petitioner for the calendar year 1944, in the amount of \$19,925.35, or for any amount.

(4) By not determining and adjudging that the aforesaid contract and promissory note created and evidenced an unconditional obligation of the petitioner to pay to the Peterman Manufacturing Co., or order, the full sum of \$400,000.00, and that 50 per cent of the average amount owing thereon during the calendar years 1944 and 1945 was rightfully and legally used by the petitioner as credit for borrowed invested capital in computing its excess profits tax for the calendar year 1944.

(5) In not determining and adjudging that there was no deficiency in petitioner's excess profits tax for the calendar year 1944, and in not vacating the determination of the Commissioner.

Prayer

Petitioner prays that the aforesaid decision of the Tax Court, and the proceedings appertaining to same, be reviewed by the United States Court of Appeals, for the Ninth Circuit. That said decision and the order entering the same, be reversed. That the Appellate Court determine there is no deficiency in the petitioner's excess profits tax for the

calendar year 1944, or at all, and that the Appellate Court grant petitioner such additional and different relief as the facts and the law may justify.

OREGON-WASHINGTON PLY-
WOOD COMPANY,

By /s/ DEAN M. SEAMING,
Vice-President.
Petitioner.

Duly Verified.

Affidavit of Service by Mail attached.

Filed September 18, 1953, T.C.U.S.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Victor S. Mersch, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 12, inclusive, constitute and are all of the original papers and proceedings, (including respondent's exhibits A thru E, petitioner's exhibits 1 thru 8, attached to stipulation of facts, and petitioner's exhibit 9, admitted in evidence) as called for by the Designation of Contents of Record on Review on file in my office as the original and complete record in the proceeding before the Tax Court of the United States entitled: "Oregon-Washington Plywood Company, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 39553," and in which the petitioner in the Tax

United States Court of Appeals for the
Ninth Circuit

No. 14084

OREGON-WASHINGTON PLYWOOD COM-
PANY, an Oregon Corporation,

Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

POINTS ON WHICH PETITIONER
WILL RELY

In presenting the above-entitled cause to the above-entitled Court, petitioner will rely on the following:

Points

(1) The Tax Court misinterpreted the legal effect of the purchase and sales contract between T. A. Peterman and wife as vendors, and the petitioner as vendee, designated as exhibit 1 in the stipulation, and the note signed by the petitioner in connection therewith, designated in the stipulation as exhibit 2, and the other facts pertaining to said transaction found by The Tax Court.

(2) The Tax Court erred in the following particulars:

(a) In concluding and adjudging that said contract and note, considered alone or in connection

with the other facts found by The Tax Court, did not constitute and evidence an unconditional obligation of the petitioner to pay Peterman Manufacturing Co., the full sum of \$400,000.00, and in concluding and adjudging that said indebtedness was not "borrowed invested capital" of the petitioner within the meaning of section 719 (a) (1) of the Internal Revenue Code, in effect during calendar year 1944.

(b) In concluding and adjudging that petitioner in computing its excess profits tax for the calendar year 1944, did not have the legal right to take credit for 50 per cent of the average amount owing on said indebtedness during that year, and its unused credits of 50 per cent of the average amount owing on said indebtedness during the calendar year 1945, as "borrowed invested capital," and by determining and adjudging a deficiency in petitioner's excess profits tax for the calendar year 1944, in the amount of \$19,925.35, or for any amount.

(c) That by not determining and adjudging the aforesaid purchase and sales contract was, under the laws of the State of Oregon, in effect a real estate mortgage to secure the payment of the indebtedness owing thereunder, to wit, \$400,000.00, and in not concluding and adjudging that said contract or mortgage and note, considered alone or in connection with other facts connected with the transaction which The Tax Court found to exist, created and evidenced an unconditional obligation of the petitioner to pay the full sum of \$400,000.00, and by not determining and adjudging that petitioner was

within its legal right in taking credit for 50 per cent of the average amount it owed on said indebtedness during the calendar years 1944 and 1945 in computing its excess profits tax for the calendar year 1944.

(d) By not determining and adjudging that there was no deficiency in petitioner's excess profits tax for the calendar year 1944, and in not vacating the deficiency determined by the Commissioner of Internal Revenue.

/s/ GEORGE J. PERKINS,
Attorney for Petitioner.

[Endorsed]: Filed October 22, 1953.